THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 20265/14

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY **APPELLANT**

and

ANGLOGOLD ASHANTI LIMITED
RESPONDENT

Neutral citation: *Merafong City Local Municipality v AngloGold Ashanti Ltd* (20265/2014) [2015] ZASCA 85 (28 May 2015)

Coram: Maya, Majiedt and Mbha JJA, Schoeman and Van der Merwe AJJA

Heard: 19 May 2015

Delivered: 28 May 2015

Summary: Review – invalidity of administrative action – Minister's ruling made in terms of s 8(9) of the Water Services Act 108 of 1997 overturning municipality's decision to levy a surcharge on water for industrial use by mines, even if invalid, exists and has legal consequences which municipality cannot simply disregard until it is set aside by court in proceedings for judicial review.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kubushi J sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MAYA JA (Majiedt, Mbha JJA, Schoeman and Van der Merwe AJJA concurring):

[1] At issue in this appeal is whether the appellant municipality (Merafong) is entitled to ignore a ruling made by the Minister of Water Affairs and Forestry (the Minister) in terms of powers vested in her by s 8(9) of the Water Services Act 108 of 1997 (the Act). The effect of the ruling was to prevent Merafong from levying incremental surcharges on water for industrial use supplied to mines owned by the respondent (AngloGold), which are situated in Merafong's jurisdictional area. The ruling further required Merafong, AngloGold Ashanti and Rand Water (formerly the Rand Water Board)[1] to negotiate a reasonable tariff for water supplied to the mines for domestic use by the latter.

[2] AngloGold, a public company, has conducted gold mining operations at its mines Tautona, Mponeng and Savuka situate near Carletonville, since the mid 1940's. Its operations require water which it uses mainly for two purposes. It uses it for industrial purposes which include dust allaying during drilling and rock handling, as a

1 Established under the Rand Water Board Incorporation Ordinance 32 of 1903, as consolidated in the Rand Water Board Statutes (Private Act) 17 of 1950, deemed to be a water board established in terms of the Water Services Act 108 of 1997.

cooling medium, as a transport medium and as a solvent in the metallurgical process. It also uses water for domestic consumption by its employees housed in hostels on the mine properties. AngloGold has its own water reticulation infrastructure. Water saved during the mining activities is stored in reservoirs for treatment and recycling. Waste water from domestic use is treated in its sewage plants operated on the mine premises. Anglogold therefore purchases water for industrial use (ie use of water for mining, manufacturing, generating electricity, land-based transport or any related purpose)[2] and domestic use only to recoup the loss incurred during the mining operations.

[3] The additional water has, since 1958, been directly supplied to it by Rand Water. The latter body is a water board and organ of State, whose primary activity is to provide water services to other water service institutions, including municipalities in their capacity as water service authorities. With the municipalities' approval, it also supplies water directly to users for industrial use and acts as a water service provider directly to consumers[3] in terms of written water supply agreements. AngloGold's water supply has, at all times, been provided through Rand Water's system of reservoirs, pipelines and other apparatus which are maintained by Rand Water. AngloGold therefore does not and has never used Merafong's water and sanitation services.

[4] In December 1997, Parliament promulgated the Act, a major piece of national legislation providing, inter alia, for the rights of access to the supply of water and sanitation envisaged in the Constitution,[4] the setting of national standards and norms

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2 As defined in s 1 of the Act.
3 In terms of ss 1 and 30(2)(*d*) of the Act, respectively.
4 The Constitution of the Republic of South Africa Act 108 of 1996.

and standards for tariffs in respect of water services,[5] the establishment and disestablishment of water boards and water services committees and their duties and powers, the monitoring of water services and intervention by the Minister or by the relevant province, the accountability of water service providers,[6] and the promotion of effective water resource management and conservation.[7] The Act further recognises local government's constitutional authority to administer water and sanitation services[8] and designates municipalities as water services authorities responsible for progressively ensuring access to water services by consumers[9] in their areas of jurisdiction.

[5] In terms of s 6(1) of the Act, 'no person may use water services from a source other than a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority'. Section 7(1) of the Act provides that 'no person may obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority'. Section 8 of the Act governs the process employed by a water services authority in respect of applications for approval made in terms of ss 6 and 7, which may not be unreasonably withheld and may be granted subject to reasonable conditions.[10] In terms of s 8(4), such an

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5 Defined in s 1of the Act as water supply services ie the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use but not water for industrial use, and sanitation services ie the collection, removal, disposal or purification of human excreta, domestic waste-water, sewage and effluent resulting from the use of water for commercial purposes.

6 Defined in s 1 of the Act as 'any person who provides water services to consumers or to another water services institution [ie a water services authority, a water service provider, a water board and a water services committee] but does not include a water services intermediary [ie any person who is obliged to water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of that contract]'.

7 As provided in the Act's Preamble and s 2.

8 In terms of para 5 of the Act's Preamble and Part B of Schedule 4 read with s 156(1)(*a*) of the Constitution.

9 Defined in s 1 of the Act as any end user who receives water services from a water services authority including an end user in an informal settlement.

10 Section 8(1)(*a*) and (*b*) of the Act.

applicant may appeal to the Minister 'against any decision, including any condition imposed, by that water services authority in respect of the application'. Subsection (9) empowers the Minister when adjudicating the appeal to 'confirm, vary or overturn any decision of the water services authority concerned'. In addition to these appeal powers, the Minister has supervisory and control powers under s 10. She or he may from time to time, with the concurrence of the Minister of Finance, prescribe norms and standards in respect of tariffs for water services.

[6] Municipalities assumed the status of water service authorities only in July 2003 following the adoption of the Strategic Framework document by the Department of Water Affairs and Forestry. On 11 February 2004, Merafong sent a written notice to all the mines in its area of jurisdiction, including AngloGold. It informed the mines that it had, with effect from 1 July 2003, been accorded the powers and functions of a water services authority. It further requested the mines to apply for approval for the supply of water for industrial use in terms of s 7 of the Act. This letter was followed by meetings at which Merafong explained the implications of the Act and its role as a water services authority.

[7] Anglogold replied on 8 April 2004 and requested Merafong's approval 'to continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariff set by, and under the conditions imposed by Rand Water'. Merafong responded by way of a letter dated 31 May 2004 headed 'APPROVAL TO BE SUPPLIED WITH WATER'. It stated that it appointed Rand Water as its water service provider which would supply water to the mines directly, bill and collect water sales revenue and assume responsibility for water quality and other technical aspects of water supply as Merafong's agent. It also set out proposed tariffs for water to be supplied to the mines which were significantly higher than Rand Water's prices and included a higher tariff for

operational use compared to domestic use.

[8] On 11 June 2014 AngloGold appealed to the Minister in terms of s 8(4) of the Act. Its main complaints were that (a) the tariff proposed by Merafong was 'excessively higher than the equivalent Rand Water tariff while [Merafong] is not adding any value to, or assuming any responsibility for any aspect of the water supply' (the difference would amount to R498 599 per month) and (b) Merafong failed to recognise AngloGold's role as a water service provider or make any attempt, other than to request information on the mine's consumption, to understand its economic situation. As indicated above, the Minister upheld the appeal. In her opinion the tariff increase of 62 per cent was unreasonable because Merafong would add no value to the services provided to AngloGold by Rand Water. She ruled that a surcharge could be levied only on the portion of water that the mines were using for domestic purposes and not for industrial use '[s]ince water for industrial use is not defined as a municipal service in terms of section 1(xxv) of the [Act]'. The Minister then directed Merafong, Anglogold and Rand Water to negotiate a reasonable tariff on the portion of water used by Anglogold for domestic purposes.

[9] Negotiations were initiated as ordered by the Minister. In July 2006 the parties concluded a draft interim agreement in terms of which the mines would be charged Merafong's tariff for water for domestic use and Rand Water's industrial tariff for the mine hostels and operational water use. The negotiation process then stalled. From July 2007 Merafong took over from Rand Water and started invoicing AngloGold for water supplied to it by Rand Water. It informed AngloGold that it would levy a flat rate on all water consumed on the mines with effect from June 2006 although it did not do so until 2008. Since July 2007 Merafong has charged AngloGold on a tariff far exceeding what it paid Rand

Water despite the Minister's ruling. (AngloGold was informed by the Chamber of Mines that Merafong regarded the ruling as invalid on constitutional grounds and that it would ignore it.)

[10] It appears from a legal opinion obtained by Merafong that its lawyers advised it to convince the Minister to withdraw her decision overturning its decision to impose tariffs on the mines. However, its attempts at engaging the Minister (who was likely *functus officio* in respect of her powers under s 8(9) in any event) towards this end failed. The formal dispute it consequently declared against her also does not seem to have achieved the desired result.[11] And it continued imposing and implementing the tariffs adopted by its council on the mines on the basis that the Minister's ruling, which it did nothing to challenge, was not applicable.

[11] Over an extended period, AngloGold sought to ascertain the legal basis for the tariffs and surcharges imposed by Merafong. When its enquiries went unattended Anglogold withheld payment of the disputed portion of the levies. In September 2007 Merafong demanded payment of the arrears on the threat that it would otherwise take 'appropriate steps … to limit water supply' to AngloGold's mines. AngloGold yielded to the demand, but informed Merafong that it did so, under protest and without prejudice to its rights, to obviate the drastic consequences and irreparable harm to its operations if its water supply was cut. It still asked Merafong to indicate the legal basis for the disputed tariffs and surcharges. In response, Merafong did not address the Minister's ruling and only listed various constitutional and statutory provisions which it claimed entitled it to do so.

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11 In terms of s 42 of the Intergovernmental Relations Framework Act 13 of 2005. Section 40 of this Act enjoins all organs of State to make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory duties and to settle such disputes without resorting to litigation.

[12] The impasse lasted until Anglogold launched application proceedings to enforce the Minister's ruling. To that end it sought a declarator that Merafong may not levy a surcharge on water for industrial and domestic use supplied to AngloGold by Rand Water and various ancillary relief and an alternative order reviewing and setting aside Merafong's imposition of a surcharge on water for both industrial and domestic use in terms of s 6(2)(*e*)(i) and/or (ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Merafong opposed the application and launched a counter-application. It sought a declarator that it has exclusive authority to set tariffs relating to the provision of water. In the event that the court below found that s 8(9) empowered the Minister to interfere with its powers relating to the setting of water services tariffs, it sought an order declaring the provisions unconstitutional to that extent.

[13] The court below granted the relief sought by Anglogold and dismissed the counter-application. Its approach was that prior to 1 July 2003 Merafong had not yet appointed a water service provider for purposes of ss 6 and 7 of the Act. Thus, the court found, when AngloGold sought Merafong's approval to continue obtaining water from Rand Water it did so, properly, in terms of those provisions. The court acknowledged Merafong's executive and legislative powers as a water services authority. But it held that such powers were subject to national legislation, ie the Act which expressly entitles the Minister, in s 8(1), to intervene where a municipality unreasonably withheld its approval or imposed unreasonable conditions in respect of applications made under ss 6 and 7. The court concluded that the Minister's ruling was therefore lawful and bound Merafong, alternatively that it was valid until set aside by a court of law.

[14] On appeal before us it was argued on Merafong's behalf that AngloGold's appeal to the Minister was ill-conceived and the judgment of the court below wrong. This was so because ss 6 and 7 of the Act were not applicable to this case as the water supplied by Rand Water was not from 'a source other than the distribution system of a water services provider' ie a third party that was neither a water service authority (in this case Merafong) or a water service provider (in this case Rand Water) within the contemplation of these provisions. The appeal therefore had no basis, continued the argument, and the Minister exceeded her powers by making the disputed ruling, which was a nullity and did not bind Merafong.

[15] It seems to me that Merafong's failure to challenge the Minister's ruling in judicial review proceedings, rather than the constitutional attack it launched against the empowering statutory provisions, poses an insuperable difficulty for its case. I will assume without deciding that the Minister's decision was *ultra vires* as was argued on its behalf. But even if unlawful, the Minister's ruling existed in fact and had legal consequences. Merafong could, therefore, not simply treat it as though it did not exist and act in the very manner that it sought to prevent.[12] As the Constitutional Court pointed out in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*:[13]

'Even where the decision [by a state official] is defective … government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it … Government should not be allowed to take shortcuts … Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a

12 *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 40.
13 *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) paras 64, 65 and 88.

proper process, in which all factors for and against are properly weighed … [T]he Constitution … does not require [public officials] to act without erring. On the contrary, it anticipates imperfection, but makes it subject to the corrections and constraints of the law.'

[16] It was contended for Merafong that it was not required to seek judicial review of the Minister's ruling in the circumstances of this case because the Minister improperly exercised her powers where the very preconditions for their invocation had not been met. This argument has no merit. It is clear from the Constitutional Court's comments in *Kirland* that it matters not if the Minister's decision did not meet the preconditions set out in ss 6 and 7 for the exercise of her appeal powers under s 8(9). There the Court said:[14]

'In our post-constitutional administrative law, there is no need to find that an administrator lacks jurisdiction whenever she fails to comply with the preconditions for lawfully exercising her powers. She acts, but she acts wrongly, and her decision is capable of being set aside by proper process of law. So the absence of a jurisdictional fact does not make the action a nullity. It means only that the action is reviewable, usually on the grounds of lawfulness (but sometimes also on the grounds of reasonableness). Our courts have consistently treated the absence of a jurisdictional fact as a reason to set the decision aside, rather than as rendering the action non-existent from the outset.'

[17] It is clear from these dicta that Merafong was obliged to approach the court to set the Minister's ruling aside and that it breached the principle of legality by simply disregarding it. And the collateral challenge it sought to mount against the ruling does not avail it because it is an organ of State. It is established in our law that a collateral challenge to the validity of an administrative action is a remedy available to a person threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative action in question.[15] The notion that

14 At paragraphs 98-99.
15 Ibid para 35; *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) para 15.

an organ of State can use this shield against another organ of State is simply untenable. These findings dispense with the need to deal with the substantive issues raised in the matter. The appeal must fail.

[18] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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MML MAYA

Judge of Appeal

APPEARANCES:

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